RENOFAC BUILDER (M) SDN BHD

v.

CHASE PERDANA BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-740-98]
13 OCTOBER 2000

CIVIL PROCEDURE: *Summary judgment - Leave to defend - Whether unconditional in view of triable issues*

CIVIL PROCEDURE: *Res judicata - Second application for summary judgment - Whether subject matter had been adjudicated upon in first application - Whether an abuse of process of court*

CIVIL PROCEDURE: *Pleadings - Statement of claim - Failure to state all material facts - Whether defective - Rules of the High Court 1980, O. 18 r. 7(1)*

The senior assistant registrar ('SAR') refused the plaintiff's 2nd application for summary judgment against the defendant for a sum of RM1,125,385 and at the same time granted the defendant the right to enter conditional leave to defend subject to depositing the said sum into court. Also, that if the defendant failed to deposit the said sum into court, summary judgment would then be entered against the defendant. Both parties aggrieved by that decision now appealed to the judge in chambers.

Held:

[1] The plaintiff's 2nd application for summary judgment should be struck out based on the principle of *res judicata.* The same subject matter had been adjudicated upon when the first application was heard and dismissed by the SAR and later on appeal by the judge in chambers. Therefore, the 2nd application was an abuse of the process of the court.

[2] By virtue of O. 18 r. 7(1) of the Rules of the High Court 1980, pleadings should be confined to all the material facts and not the law or the evidence thereto. The plaintiff's statement of claim was defective as all the material facts were not pleaded. An omission to state one material fact was fatal.

[3] The SAR on two occasions refused to entertain the plaintiff's O. 14 applications and the facts showed that there were triable issues. Since there were triable issues, the defendant should be given unconditional leave to defend.

[Plaintiff's appeal dismissed with costs; defendant given unconditional leave to defend.]

Case(s) referred to:

Alliance (Malaya) Engineering Co Sdn Bhd v. San Development Sdn Bhd [1974] 2 MLJ 94 ***(refd)***

Ang Swee Chuan v. Lim Teng Huan [1988] 3 MLJ 471 ***(refd)***

Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627 ***(refd)***

Barrs v. Jackson [1845] 1 Y & CCC 585 ***(refd)***

Blair v. Crawford [1906] 1 IR 578 ***(refd)***

Birch v. Birch [1902] P 130 ***(refd)***

Brightside Mechanical & Electrical Services Group Ltd & Anor v. Hyundai Engineering & Construction Co Ltd [1988] 1 MLJ 500 ***(refd)***

Bruce v. Odham Press Ltd [1936] 1 KB 697 ***(refd)***

Citibank NA v. Lee Chew Keok & Anor, Kuala Lumpur civil suit no: D3-23-2277-87 ***(foll)***

Conquer v. Boot [1928] 2 KB 336 ***(refd)***

Davis v. James [1884] 26 Ch D 778 ***(refd)***

Eaglesham v. McMaster [1920] 2 KB 169 ***(refd)***

Fidelities And Investments Co Ltd and Wigley Fox Partnership [1986] 33 BLR 39 ***(refd)***

Fieldrank Ltd v. Stein [1961] 3 All ER 681 ***(refd)***

Gates v. WA & RJ Jacobs [1920] 1 Ch 567 ***(refd)***

Gissco Sdn Bhd v. Blackgold Sdn Bhd [1988] 2 MLJ 397 ***(refd)***

Greenhalgh v. Mallard [1947] 2 All ER 255 ***(refd)***

Hall v. Eve [1877] 4 Ch D 345 ***(refd)***

Hoystead v. Commissioner of Taxation [1926] AC 155 ***(refd)***

La Roche v. Armstrong [1922] 1 KB 485 ***(refd)***

Langmead v. Maple [1865] 18 CBNS 270 ***(refd)***

Lin Securities (Pte) Ltd v. Noone & Co Sdn Bhd (Klang Jaya Bahru Development Bhd, Third Party) [1989] 1 MLJ 321 ***(refd)***

Lord Hammer v. Flight [1876] 24 WR 347 ***(refd)***

Lubenham Fidelities And Investments Co Ltd v. South Pembrokeshire District Council and Another; *South Pembrokeshire District Council v. Lubenham Fidelities And Investments Co Ltd and Wigley Fox Partnership [1986] 33 BLR 39* ***(refd)***

Lynde v. Waithman [1895] 2 QB 180 ***(refd)***

Kiwi Brands (M) Sdn Bhd v. Multiview Enterprises Sdn Bhd [1998] 2 CLJ Supp 194 ***(refd)***

Millington v. Loring [1881] 6 QBD 190 ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***
NW Salt Co Ltd v. Electrolytic Alkali Co Ltd [1913] 3 KB 425 ***(refd)***
Oh Kuang Liang v. Associated Wood Industries Sdn Bhd [1995] 2 CLJ 961 ***(refd)***
Ord v. Ord [1923] 2 KB 433 ***(refd)***
Philipps v. Philipps [1878] 4 QBD 139 ***(refd)***
QBE Supreme Insurance Bhd v. Syarikat Chemas Pemborong Sdn Bhd [1986] 1 MLJ 56 ***(refd)***
Re Lee Siew Kow, decd. [1951] MLJ 224 ***(foll)***
Read v. Browson [1888] 22 QBD 128 ***(refd)***
Rush & Tompkins Ltd v. Greater London Council [1988] 3 All ER 737 ***(refd)***
Sanders v. Hamilton [1907] 96 LT 679 ***(refd)***
Seear v. Lawson [1881] 16 Ch D 121 ***(refd)***
South East Asia Insurance Bhd v. Kerajaan Malaysia [1998] 1 CLJ 1045 ***(refd)***
Stephenson v. Garnett [1898] 1 QB 682 ***(refd)***
Stuart v. Gladstone [1879] 10 Ch D 644 ***(refd)***
Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v. Ghazali Ibrahim [1985] 2 MLJ 225 ***(refd)***
Ting Hua Yiew v. Ace Commercial Enterprise Sdn Bhd [1996] 2 MLJ 678 ***(refd)***
Walker v. Wilsher [1889] 23 QBD 335 ***(refd)***
Warwick v. East [1889] WN 80 ***(refd)***
Whitney v. Moignard [1890] 24 QBD 630 ***(refd)***
Wright v. Bennett [1948] 1 All ER 227 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14(1) rr. 2(1), 4(1), O. 18 r. 7(1)

Other source(s) referred to:
Keating On Building Contracts, London, Sweet and Maxwell Publication, 1995, 6th edn, p 109

For the plaintiff - Goik Kenzin; M/s Malik & Partners
For the defendant - Yee Teck Fah; M/s Yee Teck Fah & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

Introduction

By way of encl. 27, the plaintiff applied for leave to enter summary judgment against the defendant pursuant to O. 14 of the Rules of the High Court 1980 ("RHC") for the sum of RM1,125,385 together with interest at the rate of 8% per annum from 7 November 1997 until the date of full settlement and costs of the application in encl. 27 and the present suit to be assessed. On 4 April

2000, the learned senior assistant registrar ("SAR") refused to accede to the plaintiff's application in encl. 27 and instead she ordered the defendant to be given conditional leave to defend by depositing a sum of RM1,125,385 into court within one month from 4 April 2000, failing which, a summary judgment will be entered against the defendant.

The plaintiff was unhappy with the decision of the SAR and naturally it filed a notice of appeal to the judge in chambers as seen in encl. 46. The defendant too was aggrieved by the decision of the SAR and it expeditiously filed a notice of appeal to the judge in chambers as reflected in encl. 44. It would be apparent that the decision of the SAR that was handed down on 4 April 2000 was double edged: it refused the plaintiff's application for summary judgment against the defendant under O. 14 of the RHC and at the same time it granted the defendant the right to enter conditional leave to defend subject to the depositing of a sum of RM1,125,385 into court within one month from 4 April 2000, and if the defendant failed to do so, summary judgment will be entered against the defendant.

This judgment would consider both encls. 46 and 44 simultaneously.

The Undisputed Background Facts

Prior to the filing of encl. 27, the plaintiff had by way of a summons-in-chambers dated 9 January 1999 filed an application in encl. 8 (the first application) for summary judgment against the defendant pursuant to O. 14 of the RHC. Enclosure 8 was supported by an affidavit of Chow Tuck Choon that was affirmed on 6 January 1999 as seen in encl. 7. The defendant challenged encl. 8 and through Dato' Pang Wee Pat affirmed an affidavit in reply on 21 January 1999 as seen in encl. 14.

The SAR heard encl. 8 – the first application, and reserved her decision on 26 February 1999 whereupon she dismissed encl. 8 with costs. The sealed copy of the order of the SAR dated 26 February 1999 had since been extracted and it can be seen in encl. 28. The plaintiff appealed against the decision of the SAR that was handed down on 26 February 1999 in relation to encl. 8 and that appeal was by way of a notice of appeal to the judge in chambers dated 27 February 1999 as seen in encl. 20. James Foong J heard that appeal in encl. 20 on 19 April 1999 and his Lordship having reserved his decision until 22 April 1999 forthwith dismissed the plaintiff's appeal with costs and the sealed order as extracted can be seen in encl 29.

Somehow, the plaintiff held onto the notions that both the learned SAR in the person of Madam Hajjah Wan Azizon binti Ahmad and the learned judge in the person of James Foong J did not dismiss encl. 8 on its merits and so the plaintiff had the audacity to, once again, file a similar application in encl. 27 (the second application). It would be germane to mention *en passant* that the second application in encl. 27 was supported by an affidavit of Chow Tuck Choon that was affirmed on 3 May 1999 as seen in encl. 26 and the tenor of that affidavit was identical in its intent and purport with that of encl. 7 – the affidavit in support of encl. 8.

Was It Right To Order Conditional Leave To Defend?

It was argued, quite rightly, on behalf of the defendant that the SAR's decision in granting conditional leave to defend subject to the depositing of a sum of RM1,125,385 into court as alluded to earlier was wrong. What the SAR should have done was to dismiss the plaintiff's application in encl. 27 for summary judgment against the defendant and forthwith gave the defendant an unconditional leave to defend without the necessity of depositing a sum of RM1,125,385 into court. It must be recalled that when the SAR dismissed the plaintiff's first application for summary judgment in encl. 8 on 26 February 1999 she held that there were triable issues and so she held that the plaintiff was not entitled to summary judgment notwithstanding the fact that the without prejudice letter was not excluded from the evidence. Incidentally, that letter with the "without prejudice" tag was dated 19 November 1998 from the defendant to the plaintiff and it can be seen in exh. "CTC7" of encl. 7. That letter was worded as follows:

BY FACSIMILE

WITHOUT PREJUDICE

Re: Settlement in respect of all outstanding amounts due to you for goods supplied to Fosters' Hollywood at Lot 26, Jalan Ampang, Kuala Lumpur

We write with reference to the above matter and to the discussions between your Mr Paul Chow and Our Mr Tony Low recently.

As full and final settlement of all outstanding amounts due to you by us as at (the) date hereof amounting to approximately RM1,125,384.91 for the supply of goods to the abovementioned premises, we offer to pay you the sum of RM562,692.45 by way of twenty four equal monthly instalments of RM23,445.51 commencing 1 December 1998 and thereafter on the 1st day of each succeeding month. With this offer, no goods supplied will be returned to you.

Please revert back to us by 21st November 1998.

Thank you.
Yours faithfully
For and on behalf of
CHASE PERDANA BERHAD
Sgd. (Illegible).
Tony Low
Executive Director

We Renofac Builder (M) Sdn Bhd hereby accept the above terms and conditions.

...

Director

Now, in the course of adjudicating the second application for summary judgment by the plaintiff in encl. 27 against the defendant, the SAR held the view that the "without prejudice" letter as reproduced above cannot be relied upon by the plaintiff and that being the case the SAR ought to have dismissed the plaintiff's second application in encl. 27 forthwith without the necessity of ordering the defendant to deposit that sum of money into court. I had occasion to dwell on the efficacy of the without prejudice rule in the case of *Oh Kuang Liang v. Associated Wood Industries Sdn Bhd* [1995] 2 CLJ 961. The headnote of that case aptly summarised the law on the subject matter and it must be reproduced so that its potency could be seen:

> The 'without prejudice' rule is founded on the time honoured public policy of encouraging litigants to settle their differences rather than litigate them. The rule is applicable generally to exclude all negotiations genuinely aimed at settlement, whether oral or in writing, from being given in evidence. The underlying purpose is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement.

I may add that even if the negotiations between the parties were to succeed and a settlement is concluded at a later stage, the without prejudice correspondences between the parties remain privileged throughout. It would be in the nature of a continuing privilege which must necessarily mean that correspondences of this nature would remain inadmissible in any subsequent litigations that may crop up between the parties in respect of the same subject matter. What is of universal importance is that the without prejudice correspondence remain privileged and protected from subsequent discovery by

other parties to the litigation. If an authority is needed for this sound proposition of law, I need only to refer to the case of *Rush & Tompkins Ltd v. Greater London Council* [1988] 3 All ER 737 (HL). The case of *La Roche v. Armstrong* [1922] 1 KB 485 even lays down the proposition that it is not only the joint privilege of both parties to raise the issue of privilege in the context of a without prejudice communication among themselves, that privilege also extends to the parties solicitors as well.

It is solely to encourage the settlement of civil litigation that the rule as to privilege develops in regard to a without prejudice communication. It would be in the nature of without prejudice to the maker of the document in the event the terms he proposes are not accepted by the opposite party (see the speech of per Lindley LJ in *Walker v. Wilsher* [1889] 23 QBD 335 (CA) at p. 337).

So much for the law. A brief exposition of the law would certainly be of some good in the long run.

It was submitted on behalf of the defendant that when the SAR held that there was an issue as to the amount that was due to the plaintiff, the SAR ought to have dismissed the plaintiff's second application for summary judgment in encl. 27 and allowed the defendant unconditional leave to defend. Indeed this was an attractive submission that carried with it judicial support from two authorities. The first would be the case of *Lynde v. Waithman* [1895] 2 QB 180, a decision of the Court of Appeal (Lord Esher MR and AL Smith LJ) and particular reference ought to be made to the decision of Lord Esher MR where at p. 184 of the report his Lordship succinctly said:

> If there is a plausible dispute as to the amount which the plaintiff is entitled to recover, I think the judge, though bound to entertain the application for judgment under Order XIV, was bound not to allow judgment to be signed in the face of such a dispute. That is the general rule with regard to the exercise of jurisdiction under Order XIV. Therefore, I think that, although in this case the judge was right in entertaining the application, he ought not to have given leave to sign judgment, and therefore, his order should be set aside and the defendant allowed to defend.

The second authority emanates from Brunei and it is the case of *Ang Swee Chuan v. Lim Teng Huan* [1988] 3 MLJ 471, a decision of Roberts CJ. There his Lordship at p. 473 observed in trenchant terms the following:

> It must be remembered that this power is discretionary, as is the power under O. 14, and that it should not be lightly invoked, as indeed the *Mersey* case [1883] 11 QBD 531 makes clear. Similarly, under O. 14, a court will normally

> grant unconditional leave to defend where a defendant shows a triable issue as the registrar has found, in my view, correctly. Unless bad faith has been shown, such leave should not be conditional and I do not find that the defendant has shown that the claim as a whole is a sham. Nor do I think it right to give conditional leave if this would oblige the plaintiff to pay into court, or secure a guarantee, for a very large sum, as this would be tantamount to giving judgment for the defendant even though there are issues to be tried between the parties.

Would it be an abuse of the process of the court for the plaintiff to file the second application in encl. 27 for summary judgment against the defendant when the plaintiff's first application in encl. 8 of the same nature was dismissed by the SAR and later by James Foong J? The answer would certainly be in the positive. In my judgment, although the plaintiff was entitled and was not estopped from filing the second application in encl. 27 yet based on the principle of *res judicata* the filing of encl. 27 must be construed to be an abuse of the process of this court. It must be emphasised that the affidavit in support of the second application in encl. 27 was almost identical with the affidavit filed in support of the first application in encl. 8. The same exhibits were utilised by the plaintiff in the second application as was done in the first application. In my judgment, when the plaintiff filed the second application in encl. 27 it was an exercise in taking a second bite of the cherry, so to speak. Pure and simple it was an abuse of the process of the court.

Triable Issues

Should I shut out the defendant from having its day in court? This was the very question which Gopal Sri Ram JCA posed in *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609. In lucid language this was what his Lordship said at p. 615 of the report:

> The effect of Order 14 is to shut the defendant from having his day in the witness box. It is a very special jurisdiction and is only to be invoked in cases where there is no *bona fide* triable issue.

It is now trite law that in an O. 14 application, the defendant is certainly entitled to show that he has other defences over and above what has been pleaded in the statement of defence *(Lin Securities (Pte) Ltd. v. Noone & Co. Sdn Bhd (Klang Jaya Bahru Development Bhd, Third Party)* [1989] 1 MLJ 321). On the question of a triable issue, reference should be made to the speech of Mohamed Azmi SCJ in *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 CLJ 627 where his Lordship in style said:

> In our view, basic to the application of all those legal propositions, is the requirement under Order 14 for the court to be satisfied on affidavit evidence

> that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court.

Order 14 r. 4(1) of the RHC states that:

> A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the court.

and flowing from this, I venture to say that once the plaintiff succeeds in making out a *prima facie* case, the onus then shifts to the defendant to show to this court why judgment should not be entered against it by way of affidavit evidence or otherwise. But a mere bare assertion by the defendant would not be sufficient. The duty of the court is quite onerous in the extreme. The court must be vigilant and must view in perspective at the whole scenario in order to ascertain whether the defendant has a real or what is commonly known as a *bona fide* defence. Mohamed Dzaiddin J (now FCJ) in *Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v. Ghazali bin Ibrahim* [1985] 2 MLJ 225 at 226 once said, in style, that in the context of that case that from the facts and circumstances of the case as a whole, the defendant had failed to show a *bona fide* defence to the claim.

The defendant too may fashion its challenge to an O. 14 application by showing cause "otherwise" within the rubric of r. 4(1) thereto. For instance, the defendant may legitimately show that the statement of claim or the supporting affidavit is defective and if the defendant adopts this approach the court is entitled to consider it accordingly by making a ruling thereto. According to Gill CJ (Malaya) (as he then was) in *Alliance (Malaya) Engineering Co. Sdn Bhd v. San Development Sdn Bhd* [1974] 2 MLJ 94, 98, the defendant may show cause by serving a full and *bona fide* defence setting out triable issues before the issue of the summons. Tan Chiaw Thong J in *Gissco Sdn Bhd v. Blackgold Sdn Bhd* [1988] 2 MLJ 397, 399 was even prepared to hold that the failure to file an affidavit in opposition did not preclude the court from considering the defence as a mode of opposition to the plaintiff's application for summary judgment. Across the causeway, Thean J in *Brightside Mechanical & Electrical Services Group Ltd & Anor v. Hyundai Engineering & Construction Co. Ltd* [1988] 1 MLJ 500 had occasion to deal with an Order 14 application in the context of a building contract. In the headnote, the following passages appear:

> The general principle is that where an issue raised in an Order 14 application is one of law and is clear-cut, it should be disposed of rather than let it go for trial. If a point of law is raised on behalf of the defendants which the court

feels able to consider without reference to contested facts simply on the submissions of the parties, the court will do so in order to see whether there is any substance in the proposed defence. If the court concludes that the point is bad, although arguable, it will give judgment for the plaintiffs. But if the case raised problems which should be argued and considered fully, then it will give leave to defend. Applying these principles, the plaintiffs were not clearly entitled to judgment in view of the point of law raised by the defendant, *viz*, the construction of clause 11 (b). There was therefore a dispute which had to be referred to arbitration.

In *Kiwi Brands (M) Sdn Bhd v. Multiview Enterprises Sdn Bhd* [1998] 2 CLJ Supp 194 at p. 211, I had this to say of triable issues:

In my judgment, these are triable issues that will hinder the plaintiff's application for summary judgment under Order 14 of the RHC. It was obvious upon scrutiny of the affidavits that the defendant was severely disadvantaged in not being able to assess the evidence which the plaintiff had placed before this court. This was a classical *Miles v. Bull* situation where the affidavits revealed that there were some other reasons for a trial. Triable issues were also established in these cases:

(a) In *Ng Yik Seng & Anor v. Perwira Habib Bank Malaysia Bhd* [1980] 2 MLJ 83 where the defendants there raised an issue of genuineness as to their signatures in a guarantee agreement, it was held to be sufficient to amount to a triable issue.

(b) In *SM Appaduray & Anor v. R. Ananda* [1982] 1 MLJ 292, the court there held that the defendant's challenge to the accuracy of the survey in respect of the land encroachment amounted to a triable issue.

(c) In *Koh Siak Poo v. Perkayuan OKS Sdn Bhd* [1988] 3 MLJ 224 where the defendant alleged that there was a contemporaneous oral agreement in respect of a payment due to the plaintiff, being a lesser amount than the sum claimed, the court there held that the alleged oral agreement which was not inconsistent with the terms of the document was admissible in evidence under section 92 (b) and (f) of the Evidence Act 1950 and that the defendant had raised triable issues which should not be disposed of under Order 14 of the RHC.

In my judgment, this is a fit case for a full blown trial.

All these authorities would certainly assist me in adjudicating encls. 46 and 44. I will demonstrate, in due course, that this court ought not to shut out the defendant from the pleasure of testifying in a court of law. The appropriate direction would be for the trial to proceed.

I will now proceed to examine certain salient features of the case that ought not entitle the plaintiff to an O. 14 application.

Defective Statement Of Claim

It would be necessary to set out the plaintiff's statement of claim as reflected in encl. 12.

The plaintiff is said to be a company registered under the Companies Act, 1965 and has an address for service at no: AG 2, Block A, Happy Mansion, Jalan 17/13, Happy Gardens, 46400 Petaling Jaya, Selangor Darul Ehsan. The defendant is also said to be a company registered under the Companies Act, 1965 and has an address for service at 7th floor, Wisma Chase Perdana, Off Jalan Semantan, Damansara Heights, 50490 Kuala Lumpur. At para. 3 of the statement of claim it is said that the plaintiff's claim against the defendant comprised in the balance of a debt amounting to RM1,125,385 that is still due as a result of building and renovation works on Foster's Hollywood American Restaurant at Lot 26, Jalan Ampang, Kuala Lumpur and that the said works had been completed by the plaintiff on the request of the defendant. Again at para. 3 of the statement of claim it is also said that the details of the claim is within the personal knowledge of the defendant and that the plaintiff would tender all the relevant documents during the trial of the civil suit. It is also said that even though the plaintiff had on several occasions claimed from the defendant the said debt, the defendant until today refused and failed to honour the said debt. For that reason, so it is said, that the plaintiff claims against the defendant judgment for:

(i) the said debt of RM1,125,385;

(ii) interest at the rate of 8% per month from 7 November 1997 until full settlement;

(iii) the costs of the action; and

(iv) any other relief which this Honourable Court deems necessary and fair.

The defendant was most unhappy with the way the statement of claim was drafted and it was argued that the statement of claim in its present form was defective. It would be ideal at this juncture to refer to O. 18 r. 7(1) of the RHC which is worded as follows:

> (1) Subject to the provisions of this rule and rr. 10, 11 and 12, every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence,

> as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.

and it is clear that pleadings should confine itself to all the material facts and not the law or the evidence thereto. The material facts to be pleaded must be in a summary form. Murray Aynsley CJ in *Re Lee Siew Kow, decd.*, [1951] MLJ 224, 225 aptly said that:

> The basic principle is that the pleading must contain 'a statement in a summary form of the material facts …. but not the evidence by which they are to be proved'.

What would constitute pleading the material facts in the statement of claim? What must be pleaded to make the statement of claim valid within the meaning of O. 18 r. 7 of the RHC? These are some of the pertinent questions that surfaced and these questions are certainly thought provoking. Cotton LJ in *Philipps v. Philipps* [1878] 4 QBD 139 explained the meaning to be attached to the words "material facts" in this way:

> ….the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial.

Scott LJ in *Bruce v. Odham Press Ltd* [1936] 1 KB 697, 712, [1936] 1 All ER 287, 294 CA in graphic words said:

> The word 'material' means necessary for the purpose of formulating a complete cause of action, and if any one 'material' statement is omitted, the statement of claim is bad.

It would not be out of place to say and I so say that basically pleadings should categorically state:

(1) the material facts and not the law (*NW Salt Co Ltd v. Electrolytic Alkali Co Ltd* [1913] 3 KB 425);

(2) the material facts and not the evidence thereto (*Stuart v. Gladstone* [1879] 10 Ch D 644);

(3) the material facts in its entirety;

(4) all the available material facts to be incorporated; and finally

(5) the material facts must be drafted in a summary form for the opposite party to know what he is up against.

In the words of Brett LJ in *Lord Hammer v. Flight* [1876] 24 WR at p. 347:

> Pleadings now are to be merely concise statements of facts which the party pleading deems material to his case.

I will now proceed to reproduce in verbatim the whole of O. 18 r. 7 of the RHC:

> (2) Without prejudice to paragraph (1), the effect of any document or the purport of any conversation referred to in the pleading must, if material, be briefly stated, and the precise words of the document or conversation shall not be stated, except in so far as those words are themselves material.
>
> (3) A party need not plead any fact if it is presumed by law to be true or the burden of disproving it lies on the other party, unless the other party has specifically denied it in his pleading.
>
> (4) A statement that a thing has been done or that an event has occurred, being a thing or event the doing or occurrence of which, as the case may be, constitutes a condition precedent necessary for the case of a party is to be implied in his pleading.

and that would be the way in which the statement of claim ought to be drafted. According to James LJ in *Hall v. Eve* [1877] 4 Ch D 345:

> It is no part of the statement of claim to anticipate the defence, and to state what the plaintiff would have to say in answer to it.

but nevertheless, if the plaintiff's cause of action hinges on a statute, the plaintiff must plead all the facts necessary to bring it within that particular statute in question (*Seear v. Lawson* [1881] 16 Ch D 121; *Read v. Browson* [1888] 22 QBD 128; and *Davis v. James* [1884] 26 Ch. D. 778). The courts in *Millington v. Loring* [1881] 6 QBD 190, 194; and in *Whitney v. Moignard* [1890] 24 QBD 630 allowed the plaintiffs to set out in their statements of claims matters which merely tended to increase the quantum of damages recoverable, particularly when such matters of aggravation involved a fresh charge of misconduct against the defendant. According to the case of *Gates v. WA & RJ Jacobs* [1920] 1 Ch 567, a general averment in regard to the due performance of all conditions precedent must be implied in every pleading.

I pause here to take stock of the situation. The statement of claim as framed was attacked as being bad and it was the stand of the defendant that the plaintiff failed to plead the following material facts:

(1) that the plaintiff was a sub-contractor to the defendant;

(2) that there was in existence a letter of award dated 13 August 1997 as seen in exh. "CTC-1" of encl. 26 emanating from the defendant to the plaintiff and that letter of award was worded as follows:

PROPOSED INTERIOR DESIGN OF FOSTER'S HOLLYWOOD AMERICAN RESTAURANT AT LOT 26, JALAN AMPANG, KUALA LUMPUR FOR MESSRS CP RESOURCES SDN BHD

- Letter Of Award And Acceptance For Main Builders And Renovation Works

We refer to your quotation of 25th July 1997 ref: RENO/97/3048 and subsequently your letter of 4th August 1997 ref: RENO/97/3050 confirming on the discount offered for the above mentioned work, and are pleased to confirm our award to you for the execution and completion of the above works subject to the following terms and conditions:

1. The scope of works shall comprise all the works specified in the Main Sub-Contract document. You shall be responsible for all co-ordination and attendance to other sub-contractors awarded directly by Chase Perdana Berhad. Notwithstanding the above you shall be responsible for and comply with all other conditions and obligations under the contract terms and conditions.

2. You shall perform and adhere strictly to the provisions and conditions provided under the Main Sub-Contract in your performance of the said works.

3. This is a firm priced lump sum sub-contract. Your agreed sub-contract sum including Provisional Sums (RM335,000.00) and Contingency Sum (RM125,000.00) shall be RM2,281,605.00 (Ringgit Malaysia: Two Million, Two Hundred & Eighty One Thousand And Six Hundred & Five only) subject to the terms, conditions, specifications, drawings etc. contained in the Main Sub-Contract document and this Letter of Award. The Provisional Sum and Contingency are to be expended as directed by the Client/Superintending Officer (S.O.) and deducted wholly or in part if not required.

4. In addition to the items stated in the relevant clauses under General Conditions and Preliminaries of the Main Sub-Contract document, the following will apply:

i. M/S Chase Perdana Berhad, 22A Jalan Murai Satu, Batu Kompleks, 51200 Kuala Lumpur.	- Referred to as the Main Contractor.	*a*
ii. M/S Renofac Builder (M) Sdn Bhd, No. 55C Jalan SS3/29, Taman Universiti, 47300 Petaling Jaya, Selangor.	- Referred to as the Main Sub-Contractor for the main builders and renovation work.	*b*
iii. Main Contract Agreement.	- Agreement signed between CP Resources and Messrs Chase Perdana Berhad.	*c*
iv. JAG Designs Sdn Bhd.	- Referred to as the Architect and also the Superintending Officer (S.O).	*d*

5. The Main Sub-Contract document for the works shall comprise the following documents in order of precedence:

   a. This Letter of Award reference as J101/97/SC-RBSB(LA) *e*

   b. Letter(s) of Correspondences prior to signing of the Main Sub-Contract:

      i. Your letter of 4th August 1997 ref: RENO/97/3050 confirming the further discount of RM25,000.00.

      ii. Your quotation ref: RENO/97/304 dated 25th July 1997. *f*

   c. Tender documents including:

      i. Invitation letter.
      ii. General conditions and preliminaries. *g*
      iii. Instruction to tenderer.
      iv. Form of tender.
      v. Appendix-Material List.
      vi. Bills of Quantities.
      vii. Summary of Bill of Quantities. *h*

   d. Tender Drawings as per list enclosed.

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a It is agreed that the final lump sum price agreed and accepted by us shall not be subjected to any remeasurement. As such the Bill of Quantity as contained in the earlier tender document (item(s) vi & vii above) shall be amended and reworded as Breakdown of Works whereby all quantities shall be omitted, leaving the amount in each elemental breakdown as lump sum item. The breakdown b (after adjustment of the discount factor) shall represent the final agreed and accepted lump sum amount together with the schedule of rates rationalised and used for the purpose of evaluating variation order, if any, will be bounded into the Main Sub-Contract document.

c 6. The mode of the monthly progress payment to be made to you shall follow the provision of the Main Contract. The retention sum shall be 10% of the value of work done and the limit of retention shall be 5% of the contract sum or the final account sum which is the higher. One moiety (50%) of the retention shall be released upon the issuance of the Certificate of Practical Completion and the other moiety upon the issuance d of the Certificate of Making Good Defects. Payment shall be made to you within 14 days of issuance of Architects' Certificate.

7. You are to provide coordination and attendance to the other sub-contractors appointed directly by Chase Perdana Berhad and you shall (be) deemed to have included this into your lump sum price. e

8. This is a firm price sub-contract. No claims will be allowed for any variation in the cost of wages, fuel, transport, supervision, materials, exchange rates, taxes, statutory contribution, duties and levies which occur during the contract period. All rates and sums in these documents will be deemed to include such provisions. The schedule of rates stated in the f document shall form the basis of the valuation of variations where applicable. The rates shall (be) deemed to include for working overtime, Sundays and Public Holidays in order to maintain the general progress of work on site or in the event that the progress of work on site is slow in relation (to) the work programme.

g 9. The Client reserve(s) the right to vary the scope of the sub-contract work by reason of site conditions/requirements or by way of Architect's instructions as a result of which increases or decreases in quantity, variation or elimination of items and sections or phases of work may arise. No claim for any cost, loss and any other expenses in respect of any such h variation and/or omission of works will be paid by the Client.

10. The Main Sub-Contractor is advised to take his own site measurement in order to determine the exact dimensions and quantities required to complete the works and shall bring to our immediate attention any

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discrepancies in the Breakdown of Works, Specifications and Drawings. In addition, he is to check with the Architect that he is in receipt of all necessary information and that the drawings issued include the latest amendments before any sub-contract works are commenced. *a*

11. The Main Sub-Contractor is required to submit to the Architect complete sets of shop drawings and 'As-Built' drawings covering any part of the scope of this works where necessary, technical brochures and samples of materials as specified in the specifications for approvals and extend the required number of sets as and when required. *b*

12. Time is the essence of this contract, your attention is specially drawn to the Liquidated and Ascertained Damages Clause in the Contract which is RM2,500.00 per day. *c*

13. The Defects Liability period shall be 6 months as stated in the Main Sub-Contract document and commencing from the date of issuance of Certificate of Practical Completion. The Main Sub-Contractor shall attend to all defects arising from faulty materials, workmanship, installation and any other defects or design faults during this period and rectify the same, to the satisfaction of the Architect at his own costs and within a reasonable time. *d*

14. The Main Sub-Contractor shall be responsible for the strict observance of the prevailing and/or any new Labour Law that is in force or may be enforced in Malaysia. It is his responsibility to register with the Labour Department the employment of force as well as to obtain the relevant work permit for such workers where appropriate. He is required to submit a list of names, NRIC nos., address and photographs of all the workers employed in the site for the execution of his sub-contract works. Furthermore, he is to inform the Architect as and when additional workers are brought on to the site as well as to submit the aforesaid details for these workers. All costs and expenses incurred in complying with the Labour Law and Immigration Requirements shall be borne by him. *e* *f*

15. The date of possession of site shall be 13th August 1997 and the contract period shall be 75 days commencing from 13th August 1997. The date of completion shall be on 27th October 1997. *g*

16. Before commencement of work, you shall provide the Main Contractor with a Performance Bond amounting to 5% of the sub-contract sum in the form of an acceptable banker's guarantee. The guarantee shall be valid for the whole of the construction period until the issuance of Certificate of Practical Completion. The guarantee will be returned after the receipt of the Certificate of Practical Completion issued by the Architect. A sample copy of the Bank Guarantee Form for the Performance Bond is enclosed for your reference. *h*

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17. Prior to commencement of work, you shall arrange and procure the necessary Contractor All Risk and Workmen Compensation policy and pay the premium due. Copies of the policies with proof of payment made are to be extended to us for our record.

18. You shall adhere to M/S Chase Perdana's reserved rights to first option for Supply of Materials as enclosed in Appendix 1.

19. You shall be deemed to have visited the site and are fully aware of the progress of work and the prevailing site conditions. It is further assumed that you have taken all the aforesaid factors into account in arriving at the tender sum and that no claims whatsoever arising from the failure to make such allowances in the tender shall be entertained.

The terms and conditions of this Letter of Award shall take precedence over all discrepancies between the contract document.

This letter shall constitute a legal and binding sub-contract between M/S Chase Perdana Berhad and M/S Renofac Builder (M) Sdn Bhd.

This letter is forwarded to you in triplicate. You are required to acknowledge receipt of this letter and endorse your agreement to the terms and conditions stated herein by signing, stamping and duly witnessed where applicable below and return the ORIGINAL to us within seven (7) days herein.

It was the stand of the defendant, relying on the letter of award, that the following material terms must be adhered to:

(a) that the mode of payment to the plaintiff for the work done would be in accordance with the provisions of the main contract signed between CP Resources and the defendant (as per term 6 of the letter of award);

(b) that payment shall only be made to the plaintiff within 14 days from the date of issuance of the architects' certificate (as per term 6 of the letter of award); and

(c) that the completion date for the work to be carried out by the plaintiff was on 27 October 1997 (as per term 15 of the letter of award).

My attention was drawn to the case of *Ting Hua Yiew v. Ace Commercial Enterprise Sdn Bhd* [1996] 2 MLJ 678, particularly to the passage as found at p. 686 of the report where Abdul Kadir Sulaiman J said:

Order 32 rule 13(2)(a) uses an imperative word 'must'. In its ordinary meaning, it is a word of absolute obligation. Therefore, for the failure of the plaintiff to have the affidavit in support served upon the defendant within the time limit allowed by the rule, I would agree with the submission of the learned counsel

> for the defendant that it renders the said affidavit inadmissible. Order 2 rule 1 of the RHC would not be of help to the plaintiff as no reason was put forward by the plaintiff for the delay in the service of the said affidavit apart from using the order as a shield. That leaves the application of the plaintiff without any supporting evidence.

and using this as a leverage it was sought to argue that the failure to incorporate the material facts in the statement of claim rendered it bad. I may, with respect, be forgiven for my inability to understand the correlation between the passage that had just been reproduced with the facts of the present appeals. To be fair, in that case the learned judge was confronted with the prayers for special damages in the sum of RM334,302.58 and the sum of RM75,750 and by way of an alternative, restitution of the sum of RM395,000 and the sum of RM75,750 and the learned judge commented that it was not quite clear as to how the plaintiff arrived at those figures since the affidavit in support was of no assistance at all. Perhaps it was relying on this part of the judgment of the learned judge, that the defendant proceeded to argue that the statement of claim in its present form was bad in law. Be that as it may, reference was also made to the decision of VC George J in *Citibank NA v. Lee Chew Keok & Anor*, Kuala Lumpur civil suit no: D3-23-2277-87, reported in the Malaysian Case Law Library on CD-ROM on January 1999 where the headnote reads, *inter alia*:

> In the instant case, (the) plaintiff had fallen into the error of pleading the legal results or consequences without pleading all the material facts on the basis of which that result or consequence was arrived at. As (the) plaintiff had not pleaded all the facts that imposed on (the) defendant the liability of paying the amount claimed, summary judgment should not have been entered against (the) defendant.

and when this simple proposition of law was applied to the factual matrix of the present appeals, the defendant would greatly benefit from it. No wonder the defendant heavily relied on the authority of **Citibank** when the defendant submitted that the plaintiff's statement of claim was bad in law and that the learned SAR ought to have dismissed the plaintiff's second application for summary judgment in encl. 27.

That was not the end of the matter. The plaintiff advanced three reasons for holding onto the proposition that the statement of claim was not defective and these three reasons may be stated as follows:

(a) It was said that the plaintiff had sufficiently pleaded the facts on which their claim was based. It was pointed out that the statement of claim was only defective if it embarrassed the defendant in the sense that

the defendant did not know the nature of the claim that the plaintiff had instituted. It was said that the defendant knew the exact nature of the plaintiff's claim and the defendant had, in fact, filed the statement of defence to oppose the plaintiff's claim.

(b) It was said that if the statement of claim was really defective or wanting in particulars, the appropriate procedure would be for the defendant to file an application to strike out the defective statement of claim. Alternatively, so it was pointed out, that the defendant could even request for further and better particulars. Yet, the defendant did not adopt any of these measures and this indicated, so the submission went, that the defendant knew the exact nature of the plaintiff's claim.

(c) It was said that there was no necessity for the plaintiff to plead those material facts as alluded to by the defendant. It was also pointed out that the case of **Citibank** was of no assistance to the defendant because the facts in that case was distinguishable and different from the present appeals.

The nagging question to pose would be this: was the statement of claim as framed and in its present form defective as alleged by the defendant? In my judgment, all the material facts have not been pleaded and an omission to state one material fact would be fatal. The letter of award, a material fact, was not alluded to in the statement of claim and this would be sufficient to render the statement of claim defective. Even the SAR on two occasions refused to entertain the plaintiff's O. 14 applications. When the SAR dismissed the plaintiff's first application in encl. 8 for summary judgment, she held that there were triable issues. Later, the SAR refused to accede to the plaintiff's second application in encl. 27 for summary judgment but she granted the defendant the right to enter conditional leave to defend subject to the terms as alluded to in the early part of this judgment. On the available evidence, I am constrained to make the following orders in regard to the following two enclosures:

Enclosure 46

The plaintiff's appeal in encl. 46 ought to be dismissed with costs. The order of the SAR in so far as the defendant was concerned must be set aside and the defendant be given unconditional leave to defend.

In my judgment, the plaintiff's second application in encl. 27 for summary judgment should be struck out *ex debito justitiae*. The concept of *res judicata* would definitely be activated in favour of the defendant. It was pointless to

file the second application in encl. 27 because the same subject matter had been adjudicated upon when the first application in encl. 8 was heard and dismissed by the SAR and later, on appeal, by James Foong J. An array of authorities on *res judicata* can easily be itemised:

(1) *Langmead v. Maple* [1865] 18 CBNS 270;

(2) *Barrs v. Jackson* [1845] 1 Y & CCC 585;

(3) *Stephenson v. Garnett* [1898] 1 QB 682;

(4) *Ord v. Ord* [1923] 2 KB 433;

(5) *Hoystead v. Commissioner of Taxation* [1926] AC 155;

(6) *Greenhalgh v. Mallard* [1947] 2 All ER 255;

(7) *Wright v. Bennett* [1948] 1 All ER 227, CA;

(8) *Warwick v. East* [1889] WN 80;

(9) *Birch v. Birch* [1902] P 130;

(10) *Sanders v. Hamilton* [1907] 96 LT 679;

(11) *Blair v. Crawford* [1906] 1 IR 578; and

(12) *Conquer v. Boot* [1928] 2 KB 336.

Another important point to make would be this. Since it was part and parcel of my judgment that there were triable issues, unconditional leave to defend should be accorded to the defendant. A case in point would be that of *Fieldrank Ltd v. Stein* [1961] 3 All ER 681 where the defendant there raised a triable issue which was not challenged by the plaintiff and there was also no sign of bad faith, the court dismissed the plaintiff's application and gave the defendant unconditional leave to defend. Yet another case in point would be that of *QBE Supreme Insurance Bhd v. Syarikat Chemas Pemborong Sdn Bhd* [1986] 1 MLJ 56 where the court there granted the third defendant unconditional leave to defend since expert evidence on handwriting was required to decide the issue of whether the third defendant did sign the letter of indemnity. In the present appeal in regard to encl. 46, the letter of award and the architects' certificate would certainly be triable issues that would entitle the defendant to enter unconditional leave to defend.

Enclosure 44

The defendant's appeal in encl. 44 should be allowed with costs and the order of the SAR that affected the defendant which was handed down on 4 April 2000 be set aside forthwith. Unconditional leave should be given to the defendant to defend.

Lest I be accused of an oversight, I must proceed to examine the other issues raised by the parties, not in its order of priority.

No Reasonable Cause Of Action

Term 6 of the letter of demand which was reproduced verbatim somewhere in this judgment specifically laid down the mode of payment to the plaintiff which must follow the provisions of the main contract. It was therefore incumbent on this court to examine the main contract in order to ascertain the following matters:

(1) whether the plaintiff was entitled to any payment?;

(2) when was the obligation to pay the plaintiff arose?; and

(3) what other conditions must the plaintiff fulfill before payment could be effected?

But alas, the plaintiff did not exhibit the main contract in its affidavit in support that was affirmed by Chow Tuck Choon on 3 May 1999 as seen in encl. 26 which was filed in support of the second application in encl. 27 for summary judgment against the defendant. Why did the plaintiff fail to exhibit the main contract in encl. 26? Only the plaintiff can answer this crucial question. I do not propose to venture an answer nor conjecture a plausible answer. Bereft of the main contract, I would not be in a position to determine whether any payment was in fact due to the plaintiff. Consequently, the irresistible conclusion would be that the summary judgment application of the plaintiff in encl. 27 was totally misconceived in law and ought to be dismissed forthwith. This meant that the orders pertaining to encls. 46 and 44 which I had made, must be the correct orders on the strength of the available evidence.

Absence Of "Architects' Certificate"

Another important aspect of term 6 of the letter of award related to the requirement that: "Payment shall be made to you within 14 days of issuance

of architects' certificate." The defendant through Dato' Pang Wee Pat affirmed an affidavit in reply in encl. 32 on 17 May 1999 and at para. 15 thereto, the said Dato' averred that no architects' certificate had been issued and that the plaintiff had not been able to produce any architects' certificate in the affidavits in support of the plaintiff's application for summary judgment. In my judgment, the architects' certificate certifying that the amount claimed was due to the plaintiff ought to be produced and exhibited by the plaintiff in order to support the plaintiff's second application for summary judgment in encl. 27. In *Eaglesham v. McMaster* [1920] 2 KB 169, Earl of Reading CJ was of the view that in the absence of a certificate the plaintiff in that case was not entitled to maintain the action unless the plaintiff could show, (and this the plaintiff failed to show), improper dealing between the employer and the architect. The headnote by the headnoter in *Eaglesham*'s case at p. 169 to p. 170 ought to be reproduced and it was worded in this fashion:

> Held, that the provision of clause 26, making it a condition precedent to the contractor's right of action that he should have the certificate of the architect that the amount claimed was due to him was unaffected by clause 27, and that in the absence of a certificate the plaintiff was not entitled to maintain the action unless he could show (and this he failed to show) improper dealing between the employer and the architect.

The same approach was also adopted by the Court of Appeal in the case of *Lubenham Fidelities And Investments Co. Ltd v. South Pembrokeshire District Council and Another*; *South Pembrokeshire District Council v. Lubenham Fidelities And Investments Co. Ltd and Wigley Fox Partnership* [1986] 33 BLR 39. There the Court of Appeal held that under the JCT Standard Form conditions, the issue of a certificate was always a condition precedent to the right of the contractor to be paid.

The learned authors of a book entitled *"Keating On Building Contracts"*, 6th edition, a London Sweet and Maxwell publication of 1995, at p. 109 had this to say on the same subject matter:

> The contract may show by express words, or upon reading it as a whole, that the architect's certificate is a condition precedent to payment whether interim or final. It is a condition precedent if upon the true construction of the contract the employer only agrees to pay what is certified by the architect, or only to pay upon a certificate of satisfactory completion by the architect. In such a case if the contractor fails to obtain the certificate required for payment he has no present claim at law or in equity ... .

In the circumstances, without the architects' certificate how could the plaintiff be paid by the defendant. It was next to impossible and adopting the words

of the learned authors in *"Keating On Building Contracts"* without the certificate in question, the plaintiff here would have no claim at all in law. Surely this would constitute a triable issue barring an O. 14 application. The best remedy would be to proceed to trial.

Failure To Complete The Works Within The Time Frame

Term 12 of the letter of award as per exh. "CTC1" of encl. 26 emphasised that time would be the essence of the contract. Term 15 of the same letter of award stipulated that the date of completion shall be on 27 October 1997. It cannot be disputed that the plaintiff did not complete the works on or before 27 October 1997 and even if there was a dispute on this point, it would certainly be a triable issue that would prevent the plaintiff from obtaining summary judgment against the defendant.

The Liquidated And Ascertained Damages ("LAD")

It may be argued that the plaintiff was at least liable to the defendant for the LAD that may be in the region of RM22,500. The exact quantum of the LAD has yet to be ascertained by the defendant. Under the main contract, so the defendant said, the defendant was entitled to the LAD. Surely the issue of LAD would prevent the plaintiff from succeeding in its O. 14 application. It would certainly be ideal to determine the issue of LAD at the trial proper.

It must be emphasised that the existence of only one triable issue would automatically prevent the plaintiff from succeeding in its O. 14 application. Shaik Daud Ismail JCA in *South East Asia Insurance Bhd v. Kerajaan Malaysia* [1998] 1 CLJ 1045, 1048 observed that:

> It is well settled that if a defendant in an Order 14 application succeeds in raising even a single triable issue, it will not be a fit and proper case to order summary judgment.

No Verification Of The Facts

Order 14 r. 2(1) of the RHC states as follows:

> (1) An application under rule 1 must be made by summons supported by an affidavit in Form 18 verifying the facts on which the claim, or the part of a claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of any damages claimed.

and it clearly stipulates that an application for summary judgment has to be supported by an affidavit verifying the facts upon which the claim is supposed

to be based. In *Kiwi Brands (M) Sdn Bhd v. Multiview Enterprises Sdn Bhd (supra)*, I had occasion to say something in regard to O. 14 r. 2(1) of the RHC and this was what I had said (see p. 43 to p. 44 of the report):

> It is now trite law that a plaintiff cannot in proceedings for summary judgment include in his summons in chambers and affidavit in support matters which extend beyond his statement of claim. It is obvious that the purpose of an affidavit in support of the application for summary judgment is merely to verify the facts upon which the claim is based. It cannot in law enlarge the same. Order 14 r. 2(1) of the RHC provides that the application for summary judgment is to be supported by an affidavit verifying the facts upon which the claim to which the application relates. As Raja Azlan Shah Ag LP (as his Majesty then was) observed in *United Malayan Banking Corp Bhd v. Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206, especially at p. 207:
>
> > ... we cannot but observe that any defect or omission in the statement of claim cannot be made good by affidavit evidence: *Gold Ores Reduction Co v. Parr* [1892] 2 QB 14 where Mathew J said that 'it is most important that a defendant should know from the writ what the exact claim against him is'.
>
> It is my judgment and I so hold that the plaintiff was precluded from claiming artistic copyright in the label and the infringement thereof by the defendant as this had not been pleaded in the statement of claim – either in the body of or in the prayers of the same. Miss Ooi Huey Ling, learned counsel for the defendant, rightly submitted that the plaintiff's claim of artistic copyright and derivative works under s. 8 of the Copyright Act 1987 far exceeded the boundaries of the plaintiff's claim and ought to be disregarded. I wholeheartedly agree with her and I so hold accordingly.

I have reproduced, in the early part of this judgment, para. 3 of the statement of claim which was the crux of the plaintiff's claim against the defendant. In encl. 26 – the affidavit in support of the second application in encl. 27, the plaintiff surprisingly failed to verify the facts upon which the plaintiff's claim at para. 3 of the statement of claim was founded upon. Not only that, the affidavit in encl. 26 included matters which were not pleaded in the statement of claim at all. The following matters which were not pleaded in the statement of claim were included in the affidavit in encl. 26 – which was the very affidavit that supported the second application for summary judgment in encl. 27:

(1) that the plaintiff was a sub-contractor to the defendant; and

(2) that the letter of award was exhibited as exh. "CTC-1" of encl. 26.

To sum up, it would certainly be ideal for the case to proceed to trial. There were triable issues that would certainly add colour to the case when the matter proceeded to trial. The orders which I had made in regard to encls. 46 and 44 to remain and I so ordered accordingly.